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Supreme Court of the United States

OCTOBER TERM 1940

No. 734

MARY FLAGLER CARY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 735

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED,
HARRY HARKNESS FLAGLER, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 737

JEAN LOUISE MATTHEWS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Come now the Petitioners in the above entitled causes, by their Attorneys, and oppose the motion of the Solicitor General that the judgments of the court below in the present cases be affirmed upon the authority of *Maguire* v. *Commissioner,* No. 346 this Term, *Helvering* v. *Gambrill,* No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473, 474 and 475, this Term, all decided March 31, 1941.

Those cases involved Section 113(a)(5) and Section 101(c)(8) of the Revenue Acts of 1928 and 1932 and the

so-called "first-in-first-out" rule evolved by the Commissioner of Internal Revenue for application to cases where property is sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined. The instant cases, on the other hand, involve only the dissimilar Section 113(a)(5) of the Revenue Acts of 1934 and 1936. The language in that Section to be interpreted in the instant cases is as follows:

> "If the property was acquired by bequest, devise, or inheritance * * * the basis shall be the fair market value of such property at the time of such acquisition."

That language, at the time of the enactment of the Revenue Act of 1934, herein involved, had had a long history of consistent interpretation by the Bureau of Internal Revenue and the courts and had had a long legislative history throwing light on its interpretation.

The language of Section 113(a)(5) of the Revenue Acts of 1928 and 1932 involved in the *Maguire, Gambrill,* and *Campbell* cases was "time of distribution to the taxpayer" rather than "time of such acquisition", which is the language involved in the instant cases. The decisions as to the meaning of the phrase "time of distribution to the taxpayer" cannot be decisive of the instant cases, and we respectfully submit that dicta or decisions as to the meaning of "acquisition" in other Acts and in other contexts should not be taken without argument on behalf of these Petitioners as decisive of the issue involved in the instant cases. Particularly is this true in view of the fact that this Court may have been misled by the following paragraph from page 6 of the Government's Brief in the *Maguire* case:

> "The historical development of the statutory provisions dealing with the basis for property ac-

quired by gift or inheritance reveals a general plan to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands, and to use that value as the beneficiary's basis for determining gain or loss on a subsequent disposition. This scheme gives effect for income tax purposes to all changes in value of property following a gift or transmission at death. We think that with the exception of Section 113(a)(5) of the Revenue Acts of 1928 and 1932 there has been no legislative departure from this principle."

That statement is not in accordance with the facts. See *Taft* v. *Bowers,* 278 U. S. 470 (1929), Section 202(a)(2) of the Revenue Act of 1921, Section 204(a)(2) and (3) of the Revenue Acts of 1924 and 1926, and Section 113(a)(2) and (3) of the Revenue Act of 1928.

For example, property might have been purchased by a person for $15. It might have been given by that person subsequent to December 31, 1920, to a donee when the property had a fair market value of $10. If the donee sold the property for $12, the increment of $2 of value following the gift, contrary to the statement just quoted, would not be given effect for income tax purposes. In fact, prior to 1934, the donee would have been entitled to report a loss of $3 in his income tax return.[1]

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[1]See page 27 of Report No. 704 of the House Committee on Ways and Means on the Revenue Bill of 1934 where it is said:

"Under Section 113(a)(2) of the present law, if a taxpayer acquires property by gift he is required to use as his basis the basis the property had in the hands of the donor. This section has been utilized to transfer losses from one person who has little income to another person with a large income. For instance, a taxpayer has property which cost him $100,000, but which is now practically worthless. If he sells the property himself, the loss on

The statement in the Government's Brief appears to have been made as a basis for the argument that notwithstanding the fact that Congress in enacting the Revenue Act of 1928 deliberately rejected a provision to the effect that value at death should be the basis in all cases of property acquired by bequest, devise or inheritance, nevertheless a so-called "value-at-death principle" has run through the various Acts except as modified in 1928. In our Brief heretofore filed with this Court in these proceedings we have attempted to show that that "principle" was first discovered by the Treasury Department, contrary to previous rulings and court decisions, in Regulations 86 promulgated February 11, 1935, subsequent to the end of one of the taxable years involved herein.

For further arguments in opposition to the motion of the Solicitor General that the judgments of the court below be affirmed, we refer to our Brief heretofore filed with this Court, and we respectfully request that this Court hear oral argument in support of our contentions.

Respectfully submitted,

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the sale will not do him any good, due to the fact that he has no income against which to offset it. He transfers such property by gift to a relative or close friend with a large income, and such relative or close friend makes the sales and reduces his income by a $100,000 loss. To prevent such avoidance, this section of the bill requires the donee to use, for the purpose of determining loss, the donor's basis or the market value of the property at the time of the gift, whichever is lower."

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